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Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington v. Davis*

Political equality demands more than mere arithmetical compliance with the "one person, one vote" standard for apportionment.[1] Election districting schemes must ensure each voter "an equally effective voice" in the political process.[2] Multimember districting, in which the district-wide constituency elects at-large two or more representatives, can deny racial minorities an equal opportunity to participate in the district's political processes. The Supreme Court recognized this fact in *White v. Regester*,[3] in which it held that multimember districts that "cancel out or minimize" minority voting strength violate the equal protection clause.[4]

The protection developed in *White* against vote dilution in multimember districts now faces a serious challenge. In a case subsequent to *White*, *Washington v. Davis*,[5] the Supreme Court insisted that plaintiffs alleging racial discrimination in violation of the equal protection clause must prove that the defendant harbored a racially discriminatory *intent*.[6] In contrast, the standard used in the multimember district cases rests squarely upon *effect*: whether, in light of "the totality of the circumstances,"[7] the multimember district minimizes or cancels out voting strength.[8]

This Note argues that the effect-oriented standard for multimember-district vote-dilution claims is unaffected by the *Washington* intent requirement. Part I outlines the manner in which multimember districts can dilute minority voting strength. After summarizing *Washington*'s intent requirement, Part II surveys the post-*Washington* vote dilution cases and demonstrates that the applicability of the

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1. *See* R. DIXON, DEMOCRATIC REPRESENTATION 17 (1968); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 669 (1972).

2. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

3. 412 U.S. 755, 765 (1973).

4. Multimember districts may deny political minorities an equal voice as well. *See* Fortson v. Dorsey, 379 U.S. 433 (1965). Thus far, however, only racial minorities have successfully attacked multimember districts. The test established in *White*, the only Supreme Court case invalidating a multimember district, focuses upon racial vote dilution.

5. 426 U.S. 229 (1976).

6. 426 U.S. at 240.

7. White v. Regester, 412 U.S. 755, 769 (1973).

8. In addition to *White*, see Whitcomb v. Chavis, 403 U.S. 124 (1971); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd. per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

intent standard to vote dilution claims is uncertain. Part III first suggests two ways in which *White* and *Washington* may be reconciled. That section then argues that *White* is unaffected by the intent requirement because the standard for vote dilution fits within a fundamental interest analysis not altered by *Washington*. Finally, Part III asserts that, even if racial vote dilution is treated as a form of racial discrimination, the effect-oriented test used in *White* survives because it is not the kind of disproportionate-impact analysis rejected in *Washington*.

I. The Problem with Multimember Districts

Multimember districting tends to submerge the voting strength of racial or ethnic minorities. For example, suppose that over half the voters in a single-member district are black. If a multimember district is formed by combining that district with districts containing a majority of white voters, the black voters might constitute something less than a majority of the larger district's voting population. If that occurs, the black voters have been "submerged" in the white majority. Under some circumstances, such a submergence dilutes the voting strength of the minority, thereby impairing that group's ability to elect the representative of its choice. Under *White*, such vote dilution in a multimember district denies that minority's right to "effective participation in political life" in violation of the equal protection clause.

Of course, multimember districting will not inevitably dilute minority voting strength. It cannot be said in the abstract that a minority would prefer complete control over the representative of a single-member district to an influence short of control of two or more representatives of a multimember district.[9] Consequently, the Supreme Court has refused to hold multimember districts *per se* unconstitutional.[10] In *White*, the only case in which it has found a

9. *See* United States Commn. on Civil Rights, Political Participation 21 n.6 (1968):

> Nor does every measure which has the effect of diluting the votes of Negroes necessarily have an adverse effect on Negro voters. For example, some would argue that it is better for Negroes to constitute 40 percent of the voters of two districts—almost half the constituencies of two representatives—than 80 percent of the voters of one district.

In addition, see Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964); Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices*, 36 Geo. Wash. L. Rev. 790, 798, 803 (1968).

10. *See, e.g.*, White v. Regester, 412 U.S. 755, 765 (1973). On the other hand, the Supreme Court has recognized several objectionable aspects of multimember districting and has expressed a preference against it, absent unusual circumstances, in judicially created apportionment schemes. Connor v. Finch, 431 U.S. 407, 415 (1977); East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 639 (1976) (per curiam).

multimember district unconstitutional, the Court relied on "an intensely local appraisal" of the specific multimember district "in the light of past and present reality, political and otherwise."[11]

The presence or history of racial discrimination in the region in question is an important factor in determining how multimember districting affects minority voting strength. Even past discrimination by the government may have debilitating effects upon minority participation in the political process. The prior use of discriminatory registration tests and poll taxes deprived many potential minority voters of the opportunity or inclination to vote. Until recently, segregative policies of the political parties deprived minority voters of the experience or benefit of political organization. Thus, minorities have had little opportunity to form coalitions and participate in the politics of pluralism.[12] Furthermore, disproportionately low educational, employment, and income levels hinder minority members from running for office or working in campaigns.

Moreover, in a region with a history of racial discrimination, private prejudice is likely to be expressed through racial bloc voting. An interest group must have more supporters to control an election in a multimember district than in a single-member district,[13] of course, and thus a racial minority able to elect a favored representative solely with its own votes in a single-member district might be unable to elect a representative of its choice in a multimember district without white votes. But minority or minority-supported candidates are less able to draw the needed white votes where bloc voting occurs along racial lines.[14] Moreover, the minority bloc vot-

11. 412 U.S. at 769-70.

12. *See* Derfner, *Multi-Member Districts and Black Voters*, 2 BLACK L.J. 120, 127-28 (1972). *See also* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977). Professor Sandalow argues that "pluralistic politics furnish substantial safeguards" to minority interests for those legislative judgments made by Congress after considered deliberation or, perhaps, made by most state legislatures. *Id.* at 1191. According to Sandalow, however, pluralistic politics may not provide adequate safeguards at local government levels, which "experience demonstrates . . . are typically less sensitive to minority interests than the Congress," *id.* at 1192, and from which minorities may be excluded. *But see* Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 52: "To mobilize a majority of the votes in an election, each political party must appeal to a variety of 'interests' and a wide spectrum of opinion. . . . In short, the 'monolithic' majority . . . does not exist; the majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself." Professor Auerbach's analysis might well be an accurate description of the pluralistic pasturing involved in most elections. It does not, however, satisfactorily assess those elections in which multimember district vote dilution allows the candidates to ignore the interests of a minority group.

13. *See* Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577, 1586-87 (1970).

14. Justice White has recognized this fact. In his opinion for the plurality in United Jewish Organizations v. Carey, 430 U.S. 144, 166-67 (1977), he stated:

ing necessary for the group to have a realistic possibility of electing a candidate may be exploited by white politicians to generate white backlash, thereby strengthening bloc voting against the minority-supported candidate.[15] Thus, where pervasive racial discrimination exists, multimember districts enhance the likelihood that discrimination will affect elections.

Multimember districts not only increase the difficulty of electing minority candidates, they also decrease the likelihood that the minority will be adequately represented by the successful white candidates. Nonminority representatives who can win elections without minority support have little incentive to respond to the particular needs and interests of the minority.[16] Multimember districts, then, may adversely affect the quality of representation as well as the voting strength accorded a minority group.

The use of certain electoral rules increases the vote-diluting impact of multimember districts.[17] A "majority" rule requires a run-off election between the two candidates with the most votes if no candidate receives a majority in the first election. The run-off allows white voters who scattered their votes among various white candidates in the first election to consolidate their vote in the second to defeat a minority candidate who received a plurality of the vote in the first election. A "place" rule, requiring each candidate to run

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Where it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district.

In addition, see Beer v. United States, 425 U.S. 130, 144 (1976) (White, J., dissenting).

In *United Jewish Organizations*, Chief Justice Burger expressed disagreement with this concept: "The notion that Americans vote in firm blocs has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white." 430 U.S. at 187 (dissenting opinion). With all due respect, the Chief Justice's statement is overbroad. That blacks have been elected in some districts suggests no more than that blacks have not been denied participation in the nomination and election processes of that district. It neither shows that racial bloc voting has been eradicated in other districts nor refutes Justice White's assessment of the impact of racial bloc voting where it does occur.

15. In White v. Regester, 412 U.S. 755 (1973), the Supreme Court recited a district court finding that, as recently as 1970, a "white-dominated organization . . . in effective control of Democratic Party candidate slating" in a Texas county employed " 'racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.' " 412 U.S. at 766-67 (quoting the district court decision Graves v. Barnes, 343 F. Supp. 704, 727 (W.D. Tex. 1972)).

16. *See* White v. Regester, 412 U.S. 755, 768 (1973).

17. For a listing of the various means of vote dilution, see Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 358-60 (1976); Derfner, *Racial Discrimination and the Right To Vote*, 26 VAND. L. REV. 523, 553-55 (1973). Some of these features were involved in White v. Regester, 412 U.S. 755, 766-67 (1973), and in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *affd. per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). In addition, see Beer v. United States, 425 U.S. 130, 143 (1976) (White, J., dissenting).

for a specific "place" or "post," results in head-to-head contests for each office. Those whites wishing to vote along racial lines thereby know which white candidate to vote for to defeat a minority candidate. An "anti-single shot" provision requires the voter to vote for as many candidates as there are offices to be filled. Under this rule, the ballot is given no effect if it contains fewer than the maximum number of votes. Thus, unless the minority can field as many candidates as there are offices, the minority voter cannot vote for a minority candidate without also voting for a nonminority candidate, which reduces the minority candidate's chance for election.

The generalization that a racial minority with influence short of control of two or more representatives in a multimember district is not conclusively disadvantaged compared to a minority having majority control of one representative in a single-member district does not prove to be accurate in a region characterized by voting along racial lines. In that circumstance, less than majority control may be tantamount to no control at all. In a region where both official and private racial discrimination is less prevalent, however, racial factors may play a lesser part in the evaluation of candidates, voting may not fall so squarely on racial lines, and multimember districts will not inevitably result in racial vote dilution. Where white as well as minority candidates must seek support across racial lines and where white voters are willing to support minority candidates, the defeat of minority candidates will more often be the ordinary result of the political process than of discrimination inherent in that process.[18]

The Supreme Court faced a racial vote dilution challenge to a multimember district for the first time in *Whitcomb v. Chavis*.[19] In that case, the plaintiffs alleged that an Indiana statute establishing a particular county as a multimember district diluted the vote of urban ghetto dwellers, most of whom were poor blacks.[20] The Court refused to invalidate the state statute because the plaintiffs had failed to carry the burden of proving that the multimember district "unconstitutionally operate[d] to dilute or cancel out" voting strength.[21] In so holding, the Court noted that no showing had been made that

18. *See* Whitcomb v. Chavis, 403 U.S. 124, 153 (1971), where the Court determined that, on the facts shown, the failure of the minority "to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes."

19. 403 U.S. 124 (1971). A claim of racial vote dilution had been raised in Fortson v. Dorsey, 379 U.S. 433, 439 (1965), but was not argued before the Supreme Court and therefore was not decided.

20. 403 U.S. at 129.

21. 403 U.S. at 144, 146.

blacks were prevented from registering, voting, or choosing a political party and participating in its affairs. Although no express finding appeared in the record, the Court inferred from the evidence that the Democratic Party, the dominant party among the urban black voters, could not afford to ignore them and did not overlook them in selecting candidates.[22] In short, the plaintiffs had failed to show that they "had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice.[23]

The Supreme Court sustained a claim of racial vote dilution in a multimember system two years later in *White v. Regester*.[24] The county-wide multimember districts of Dallas County and Bexar County, Texas, were alleged to dilute the vote of blacks and Mexican-Americans, respectively. According to the Court, the "plaintiffs' burden [was] to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question."[25] Evidence convincing the Court that the plaintiffs had met that burden included a history of governmental racial discrimination in the locality; a "majority vote" requirement and "place" rule; the fact that only two blacks had ever been elected in Dallas County to the Texas House of Representatives; the failure of the legislature in question, as well as of the two political parties, to show a good-faith concern for minority needs; the recent use of racial campaign tactics; a cultural and language barrier that inhibited the Mexican-Americans' participation in Bexar County's electoral process; and restrictive voter registration requirements.[26] Based on "the totality of the circumstances," the Court affirmed the district court's conclusion that the multimember districts in question excluded plaintiffs "from effective participation in political life."[27]

White v. Regester has often been examined and applied. The Fifth Circuit, which has decided most of the multimember district cases, explicated *White* thoroughly in *Zimmer v. McKeithen*.[28] The

22. 403 U.S. at 149-50 & n.30.

23. 403 U.S. at 149.

24. 412 U.S. 755 (1973).

25. 412 U.S. at 766.

26. 412 U.S. at 765-69.

27. 412 U.S. at 769.

28. 485 F.2d 1297 (5th Cir. 1973) (en banc), *affd. per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). *Zimmer* established "access to the political process" as the "barometer of dilution of minority voting strength." 485 F.2d at 1303. As to proof establishing a lack of political access, the *Zimmer* court said that

> [w]here a minority can demonstrate a lack of access to the process of slating candidates,

standard developed in *Whitcomb* and *White* and adopted in *Zimmer* for determining the constitutionality of multimember districts[29]

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the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester . . . demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305.

Zimmer involved the validity of a federal district court-ordered malapportionment remedy that included a change from single-member to multimember districts. The Supreme Court affirmed the Fifth Circuit's invalidation of the plan solely on the basis of Connor v. Johnson, 402 U.S. 690 (1971), which stated a preference for single-member districts in court-ordered apportionment plans. 424 U.S. 636 (1976) (per curiam). The Court explicitly stated that the judgment was affirmed "without approval of the constitutional views expressed by the Court of Appeals." 424 U.S. at 638. Nonetheless, the Court's opinion did not imply disapproval of those views, and the Fifth Circuit has continued to rely on *Zimmer*. *See* Nevett v. Sides, 571 F.2d 209, 214 n.8 (5th Cir. 1978); Parnell v. Rapides Parish School Bd., 563 F.2d 180, 184 (5th Cir. 1977); David v. Garrison, 553 F.2d 923, 926 (5th Cir. 1977); Paige v. Gray, 538 F.2d 1108, 1111 (5th Cir. 1976).

29. Minority voting strength may also be diluted by racially gerrymandered single-member districts or by annexation that alters the racial composition of the political unit. For a catalog of dilutive districting schemes and election procedures, see Derfner, *supra* note 17, at 553-58.

A gerrymandered single-member district might either concentrate substantially all the minority voters within one district, *see* Wright v. Rockefeller, 376 U.S. 52 (1964), or divide minority voters among several districts, *see* Connor v. Finch, 431 U.S. 407 (1977); United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977). In the first instance, minority voters may complain that their political influence has been diluted because their votes have been restricted to one district. In the second instance, minority voters may claim that their voting strength has been diluted because their votes have been diffused over several districts and therefore do not constitute a strong political force in any one district.

Although it is unclear what standard the Supreme Court will use to evaluate claims that single-member districting schemes impermissibly dilute minority voting strength, recent cases suggest that, as in challenges to multimember districts, the Court will inquire whether the plan "minimizes or cancels out" minority voting strength. In Connor v. Finch, 431 U.S. 407 (1977), the Court did not address the contention of black plaintiffs that their voting strength was diluted by a reapportionment plan that diffused black voters among several single-member districts with white majorities. In dictum, however, Justice Stewart, writing for the Court, suggested that the plan would be invalid if drawn with the "purpose to minimize the voting strength of a minority group," 431 U.S. at 425, but gave no indication about what evidence is necessary to show that black voting strength has in fact been minimized. In all but the extreme case, it is open to debate whether a concentration or diffusion minimizes or maximizes minority voting strength. *See* Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964), in which black intervenors defended a districting plan challenged by black plaintiffs; *United Jewish Organizations*, 430 U.S. at 172-73 (Brennan, J., concurring in part).

Justice Blackmun, concurring in the result in *Connor*, stated that

> it is not helpful to look at isolated aspects of a statewide apportionment plan in order to determine whether a racial or other improperly motivated gerrymander has taken place. Districts that disfavor a minority group in one part of the State may be counterbalanced by favorable districts elsewhere. A better approach, therefore, is to examine the overall effect of the apportionment plan on the opportunity for fair representation of minority voters.

431 U.S. at 427. This notion of overall "fair representation" was advanced earlier in *United Jewish Organizations*. In that case, according to Justice White, the voting strength of a group of Hasidic Jews that was split between two districts with black majorities was not minimized or

looks to the effect of the district on minority voting strength, not to the underlying purpose in fashioning that district.[30] Neither *Whitcomb* nor *White* was cited or discussed when, in *Washington v. Davis*, the Supreme Court established its intent requirement for racial discrimination claims, and the lower courts have neither convincingly accepted nor rejected the intent requirement in vote dilution claims. Thus, the current status of the *White* standard is uncertain.[31] The most recent Fifth Circuit cases hold that the evidence

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cancelled out "as long as whites in Kings County, as a group, were provided with fair representation." 430 U.S. at 166. His discussion implied that "fair representation" loosely corresponds to proportion of population, though the Court has stated that a group's failure to elect legislators in proportion to its size does not by itself state a claim of vote dilution. White v. Regester, 412 U.S. 755, 765-66 (1973). Justice Brennan, though concurring in the result, was not satisfied that the "vicarious" representation implicit in Justice White's notion of fair representation for whites as a group "fully answers the Hasidim's complaint of injustice." 430 U.S. at 171 n.1.

Thus, it appears that the standard for challenges of vote dilution in single-member districts may be the same as that stated in *White*, 412 U.S. at 765: does the plan minimize or cancel out the voting strength of the group in question? The Supreme Court has not, however, reached agreement on what evidence is necessary to demonstrate a minimization of voting strength in a single-member district plan.

The Fifth Circuit, on the other hand, has expressly applied to single-member districts both the *White* standard and *Zimmer* test, *see* note 28 *supra*, which were developed to assess vote dilution in multimember districts. Nevett v. Sides, 571 F.2d 209, 218-19 (5th Cir. 1978); Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); Robinson v. Commissioners Court, 505 F.2d 674, 678 (5th Cir. 1974). This approach seems logical, particularly where minority voters are diffused across several districts. If those voters can prove the various factors required by *White*, they have demonstrated that single-member districting denies them full and effective participation in the political process. *See* note 63 *infra*. It will be much more difficult, of course, for minority plaintiffs concentrated in one district to show that their vote has been diluted, since it is likely that the process of nomination and election will be open to minorities in that district and that the minority-favored candidate will have a fair opportunity to win. *See United Jewish Organizations*, 430 U.S. at 166-67.

Annexation may dilute minority voting strength simply by adding white voters to the political unit. In Holt v. City of Richmond, 459 F.2d 1093 (4th Cir.) (en banc), *cert. denied*, 408 U.S. 931 (1972), the Fourth Circuit, sitting en banc, refused to invalidate an annexation that added 45,706 nonblacks and 1,557 blacks to the city of Richmond, Virginia. According to the court, the plaintiffs had failed to prove a purposeful design to dilute black voting strength. The Supreme Court has not decided a constitutional challenge to an annexation. *Cf.* City of Richmond v. United States. 422 U.S. 358 (1975) (discussing annexation under the Voting Rights Act of 1965). The application of *White* to an annexation is questionable, since the *White* factors are not pertinent to an annexation. An annexation could conceivably add so many nonminority voters to the political unit that a multimember or single-member district within that unit comes under suspicion. *See generally* Note, *The Right To Vote in Municipal Annexations*, 88 HARV. L. REV. 1571 (1975).

30. *Zimmer* has been recently interpreted "as impliedly recognizing the essentiality of intent in dilution cases by establishing certain categories of circumstantial evidence of intentional discrimination." Nevett v. Sides, 571 F.2d 209, 215 (5th Cir. 1978). *See* note 79 *infra* and accompanying text. *But see* Judge Wisdom's specially concurring opinion in *Nevett*, 571 F.2d at 231. Before *Washington*, however, no court thought that *Zimmer* or *White* required evidence of discriminatory intent.

31. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 754 (1978); The Supreme Court, 1976 Term, 91 HARV. L. REV. 1, 289 n.34 (1977) [hereinafter cited as *The Supreme Court, 1976 Term*].

required by the *Zimmer* test is sufficient to establish circumstantial proof of an invidiously discriminatory purpose.[32] Although *White* and *Washington* can be reconciled in this respect, this Note argues that the *White* vote dilution test should be completely exempted from the *Washington* intent requirement.

II. THE *WASHINGTON* INTENT TEST AND MULTIMEMBER DISTRICTS

For several years the Supreme Court has struggled to describe how the purpose and impact of official action are relevant to equal protection analysis. The Court's decisions on this problem have been described as "somewhat less than a seamless web."[33] In *Washington v. Davis*,[34] the Court attempted to clarify its position by asserting that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[35] Lower federal courts faced with vote dilution challenges to multimember districts have responded in disparate ways to *Washington*'s intent standard. After discussing *Washington* and how the lower courts in subsequent cases have treated *White*, this Note will argue that proof of invidious discriminatory intent should not be required of plaintiffs alleging racial vote dilution in multimember districts.

A. Washington *and the Intent Requirement*

The plaintiffs in *Washington* claimed that a written personnel test given to job applicants by the District of Columbia Metropolitan Police Department violated the equal protection clause. They produced evidence that four times as many blacks as whites failed the test. On the premise that lack of discriminatory intent in the design or use of the test was irrelevant, the District of Columbia Circuit held that the racially disproportionate impact shown by the plaintiffs established a denial of equal protection.[36]

The Supreme Court reversed. After stating that it had never adopted the standard for racial discrimination in employment under

32. *E.g.*, Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978).

33. Beer v. United States, 425 U.S. 130, 148 n.4 (1976) (Marshall, J., dissenting).

34. 426 U.S. 229 (1976).

35. 426 U.S. at 240. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977).

36. 512 F.2d 956, 961 (D.C. Cir. 1975). The District of Columbia Circuit applied the standard for judging employment tests set out in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Supreme Court interpreted Title VII of the Civil Rights Act of 1964. *See* 512 F.2d at 959.

Title VII of the Civil Rights Act of 1964[37] as the equal protection standard, the Court insisted that its cases "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[38] Rather, the Court declared, "the basic equal protection principle" requires that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[39] Such a purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution," nor does it alone compel strict scrutiny by the reviewing court.[40]

The Supreme Court addressed the issue of discriminatory intent again the next Term in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[41] In that case, the Seventh Circuit had invalidated a municipality's zoning decision on the ground that its "ultimate effect" was racially discriminatory.[42] The Supreme Court reversed, reaffirming its position that the equal protection clause requires proof of invidious discriminatory intent. In discussing the types of evidence that might constitute such proof, the Court acknowledged that disproportionate impact was an "important starting point."[43] In addition, the Court identified as important the historical background of the decision, the specific events leading to that decision, any substantial departure from normal decision-making procedures, and the legislative or administrative history of the decision.[44]

B. *Supreme Court References to* White v. Regester *After* Washington v. Davis

Although the Supreme Court has not decided any vote dilution cases involving multimember districts since *Washington*,[45] it has re-

37. 42 U.S.C. § 2000e-2 (1970).

38. 426 U.S. at 239 (emphasis original).

39. 426 U.S. at 240.

40. 426 U.S. at 242.

41. 429 U.S. 252 (1977).

42. 517 F.2d 409, 414 (7th Cir. 1975).

43. 429 U.S. at 266.

44. 429 U.S. at 267-68. The Court did not purport to make an exhaustive summary of the possible evidence of purposeful discrimination. 429 U.S. at 268.

45. However, the Court has agreed to review the decision in Wise v. Lipscomb, 551 F.2d

ferred to *White* in subsequent apportionment cases.[46] None of the references, however, reveal whether the Court considers *Washington*'s intent standard to have affected *White*'s effect-oriented test for multimember districts. Writing for the Court in *United Jewish Organizations v. Carey*,[47] Justice White used the standard of *White* to explain that Hasidic Jews, whose community had been divided between two districts in a reapportionment plan, had not suffered a fourteenth or fifteenth amendment violation since "the plan did not minimize or unfairly cancel out white voting strength."[48] In his

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1043 (5th Cir. 1977), *cert. granted*, 434 U.S. 1008 (1978), which involves the limited use of at-large elections in a state-drawn apportionment plan.

46. Connor v. Finch, 431 U.S. 407 (1977); United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

47. 430 U.S. 144 (1977).

48. 430 U.S. at 165. The fifteenth amendment states that the right to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." The role of that amendment in multimember district challenges is uncertain. *White* was clearly based upon the fourteenth amendment. *See* 412 U.S. at 767. As discussed in Part III *infra*, the standard used in *White* was first announced in Fortson v. Dorsey, 379 U.S. 433, 439 (1965). The *Fortson* decision was clearly rooted in the fourteenth amendment and not the fifteenth because the multimember district in question was attacked by nonminority plaintiffs. Thus, in *White*, the Court handled the multimember district problem only under the fourteenth amendment even though the plaintiffs alleging vote dilution were blacks and Mexican-Americans.

Nonetheless, some lower courts have assumed, without discussion, that proof of the *White* standard indicates a violation of the fifteenth as well as the fourteenth amendment. *See, e.g.*, David v. Garrison, 553 F.2d 923, 925, 928 (5th Cir. 1977); Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977). In the most recent pronouncement on the subject, a Fifth Circuit panel expressly held that the fifteenth amendment, like the fourteenth, requires a showing of improper intent. Nevett v. Sides, 571 F.2d 209, 220-21 (5th Cir. 1978). Furthermore, in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), Justice White seemed to suggest that the same evidence, including the fact that the districting plan in question did not "minimize or cancel out" voting strength, is probative under both the fourteenth and fifteenth amendments. 430 U.S. at 165-67. In the same case, Justice Stewart cited *White* while discussing the fifteenth amendment, 430 U.S. at 179 (concurring opinion), though one year earlier in his opinion for the Court in Beer v. United States, 425 U.S. 130, 142 n.14 (1976), he had cited *White* as a fourteenth amendment case. At least where racial vote dilution is alleged, then, it appears to make little difference which amendment is invoked. The multimember district problem cannot be completely relegated to the fifteenth amendment, however, since the Supreme Court is still willing to hear vote dilution complaints from political as well as racial groups. *See* text at notes 142-162 *infra*.

Even if the *White* test has been incorporated into the fifteenth amendment, the questions remain whether that amendment should provide even greater protection than the fourteenth and whether the fifteenth amendment would be violated in circumstances other than those relevant to the *White* test. The fifteenth amendment standard, specifically the significance of purpose and effect, is as unclear today as the fourteenth amendment standard was before *Washington*. *See* Beer v. United States, 425 U.S. 130, 148 n.4 (1976) (Marshall, J., dissenting); Harper v. Levi, 520 F.2d 53, 69-71 (D.C. Cir. 1975). *But see Nevett*, 571 F.2d at 220-21. Justice Stewart, writing for the court in *Beer*, implied that purposeful discrimination is as necessary under the fifteenth as the fourteenth amendment. 425 U.S. at 142 n.14. In his dissenting opinion in *Beer*, Justice Marshall attempted to show that the fifteenth amendment standard was the same as that of the Voting Rights Act of 1965, 42 U.S.C. § 1973b (1970 & Supp. V 1975)—that is, whether the law or official act in question has the purpose or effect of abridging the right to vote. 425 U.S. at 148-49. Even in that attempt, however, Justice Marshall could not untangle the fourteenth and fifteenth amendment precedents. 425 U.S. at 148 n.4, 156 & n.15.

concurrence, Justice Brennan cited *Whitcomb v. Chavis*,[49] the antecedent of *White*, as an example of "a classification that effectively downgraded minority participation in the franchise."[50] Such a classification, Justice Brennan claimed, would be suspect and prohibited. Finally, Justice Stewart, in a concurring opinion, cited *White* in support of his contention that the Hasidic Jews had not proved a fifteenth amendment violation because they "made no showing that the redistricting scheme was employed as part of a 'contrivance to segregate'; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process."[51]

At the least, these references suggest that the standard for judging multimember districts remains the same as that stated in *White*—that is, whether the plan minimizes or cancels out voting strength. Unfortunately, they do not clarify whether proof of invidious discriminatory purpose must now be included among the various factors showing the minimization in voting strength. Writing for the Court in *United Jewish Organizations*, Justice White analyzed the "impact of the . . . plan on the representation of white voters in the

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The fifteenth amendment's proscription against abridging the right to vote "on account of race" could be read to embrace the concerns about irrationality, stigma, and frustration underlying the fourteenth amendment's proscription of racial discrimination. *See* text at notes 135-38 *infra*. However, the fifteenth amendment leaves open the possibility that voters and nonvoters may be differentiated on the bases of attributes other than race, color, or previous condition of servitude. Although differentiations on such bases as literacy or age could conceivably stigmatize or frustrate nonvoters, they are less likely to rest upon irrational assumptions as to the relative worth of different groups than differentiations on the basis of race. Thus, the fifteenth amendment's prohibition could be limited to racially motivated decisions that deny or abridge the right to vote. Most of the Supreme Court's fifteenth amendment decisions can be interpreted as resting upon such an intent standard. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953).

On the other hand, it can be argued that, because the fifteenth amendment singles out the right to vote as deserving express constitutional protection against infringement on account of race, that amendment guards against more than stigma and frustration. A decision abridging the right to vote because of race would therefore be impermissible.

For the development of the theory that the fifteenth amendment provides "an aggregate right to potential proportional representation for racial groups," see Note, *United Jewish Organizations v. Carey and the Need To Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 572 (1978).

49. 403 U.S. 124 (1971), discussed in text at notes 21-25 *supra*.

50. 430 U.S. at 170. Justice Brennan's invocation of the "suspect classification" doctrine is curious. The Supreme Court has not spoken of suspect classifications in any of the cases involving multimember districts. *See* White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). Although race is clearly a suspect classification, Korematsu v. United States, 323 U.S. 214, 216 (1944), the Court in *Whitcomb* did not take that approach to the problem of multimember districts. *See* Note, *Discriminatory Effect of Elections At-Large: The "Totality of Circumstances" Doctrine*, 41 ALB. L. REV. 363, 372 (1977).

51. 430 U.S. at 179.

county . . . as a whole,"[52] and thereby strongly suggested that effect alone remains the focus. Justice Brennan's concurring opinion seemed to agree with that suggestion. On the other hand, Justice Stewart's comment might indicate that he would require a purposeful minimization or cancelling of the minority vote.

Moreover, the plaintiffs in *United Jewish Organizations* questioned the constitutionality of a single-member district plan, not of a multimember district scheme. Although Justice White's concern with the impact of white voters in the county "as a whole" appears to recognize an effect test, his opinion is inconclusive, since it may have merely reflected the concern expressed a month later by Justice Blackmun in *Connor v. Finch*:[53] because one single-member district that disfavors some group may be counterbalanced by a second district elsewhere that favors that group, "it is not helpful to look at isolated aspects" of the plan for evidence of improper motive.[54] Rather, Justice Blackmun contended, the Court should examine the "overall effect" of the plan on voting strength.[55] Thus, Justice White may have focused on effect in *United Jewish Organizations* to avoid a possibly misleading inquiry into the isolated aspects of the single-member plan that the Hasidic Jews challenged. Multimember districts do not present that problem, however, since they will not involve any "counterbalancing" of districts favoring or disfavoring particular groups and thus involve no misleading "isolated aspects." Justice White's analysis does not necessarily imply, therefore, that the Court will not require proof of discriminatory purpose in challenges to multimember districts.[56]

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52. 430 U.S. at 166.

53. 431 U.S. 407 (1977).

54. 431 U.S. at 427 (concurring opinion).

55. 431 U.S. at 427.

56. The Supreme Court also referred to *White* in Connor v. Finch, 431 U.S. 407 (1977). Because the apportionment in question in that case failed to satisfy even the basic one-person, one-vote standard, the Court did not address the plaintiffs' allegation that it also diluted black voting strength. The Court did, however, cite *White* and *Whitcomb* when referring to the plaintiff's "claim of impermissible racial dilution." 431 U.S. at 422 & n.22. In light of the fact that *United Jewish Organizations* predated *Connor*, it could be inferred that this citation affirms the supposition that *White*'s "minimize or cancel out" language survived *United Jewish Organizations* and remains the standard for vote dilution claims. However, to infer from this naked citation that the Court will add discriminatory intent to *White*'s list of evidentiary factors would be mere conjecture. If anything, dicta in the *Connor* opinion suggest that, at least in regard to single-member districting, a showing of discriminatory purpose will be required. *See* 431 U.S. at 425-26.

C. *Lower Court Decisions on the Intent Requirement in Vote Dilution Cases*

The Fifth Circuit's post-*Washington* vote dilution decisions[57] have not been completely consistent, though one panel of that court may have reconciled these decisions in four consolidated cases recently decided. In *Paige v. Gray*,[58] the first of the decisions after *Washington*, black voters challenged an at-large system of electing city commissioners. The district court, relying on *Gomillion v. Lightfoot*,[59] a fifteenth amendment case, had invalidated the system because its "inevitable effect" was to dilute black voting strength.[60] On appeal, the Fifth Circuit remanded the case to the district court for evaluation under the standards developed in *White* and *Zimmer*, warning that "it is likely that the Supreme Court will require circumstantial proof of unlawful motive."[61] The panel probably did not believe, however, that *Washington*'s intent requirement would pose a substantial obstacle to the plaintiffs or the district court. The only quotation of *Washington* in the *Paige* opinion was of Justice Steven's concession that where the disproportionate impact is as dramatic as in *Gomillion*, " 'it really does not matter whether the standard is phrased in terms of purpose or effect.' "[62]

Sitting en banc in the second of the post-*Washington* cases, *Kirksey v. Board of Supervisors*,[63] the Fifth Circuit considered

57. In chronological order, Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976); Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 968 (1977); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Parnell v. Rapides Parish School Bd., 563 F.2d 180 (5th Cir. 1977), and four consolidated cases: Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978) (per curiam).

58. 538 F.2d 1108 (5th Cir. 1976).

59. 364 U.S. 339 (1960). *See* text at note 121 *infra*.

60. 399 F. Supp. 457, 464 (M.D. Ga. 1975).

61. 538 F.2d at 1110.

62. 538 F.2d at 1110 n.3 (quoting 426 U.S. 229, 254 (1976) (Stevens, J., concurring)). *See* text at note 119 *infra*.

63. 554 F.2d 139 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 968 (1977). The plaintiffs in *Kirksey* claimed that a redistricting scheme diluted black voting strength by splitting a concentrated black community among five districts. The Fifth Circuit applied the standards developed in *White* and *Zimmer* for judging vote dilution in multimember districts on the assumption that "they have equal application to redistricting schemes making use of single-member districts." 554 F.2d at 143. That assumption seems logical in light of the Supreme Court's handling of redistricting schemes. In United Jewish Organizations v. Carey, 430 U.S. 144 (1977), which involved a claim identical to that made in *Kirksey*—that a group's voting strength had been impermissibly diffused between several single-member districts—the Court examined the impact on the complaining group's voting strength in the region as a whole. 430 U.S. at 166. In addition, see Connor v. Finch, 431 U.S. 407, 427 (1977) (Blackmun, J., concurring). The standards established in *White* and *Zimmer* also look to the overall impact of the

Washington and *Arlington Heights*[64] at greater length and attempted to limit the application of those cases in disputes involving racial vote dilution. Before turning to intent, the court affirmed two findings of fact. First, the plaintiffs had proved at trial that, at least until only a few years earlier, blacks in Hinds County had been intentionally excluded from participation in the political process.[65] Second, a showing had been made that the districting plan had been drawn without any improper motive.[66] Despite the second finding, the court invalidated the districting scheme because of its perpetuation of the proven prior intentional discrimination:

> Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access [to the political process] that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue unabated. Such a rule would *sub silentio* overrule *White v. Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.[67]

Although conceding that *Washington* and *Arlington Heights* sharpened the emphasis on discriminatory purpose, the Fifth Circuit insisted that "nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action."[68] In effect, the court interpreted the equal protection clause as placing an affirmative duty upon the defendant board of supervisors to ameliorate the residual impact of past discrimination.[69]

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districting scheme on political participation. Thus, the Fifth Circuit was justified in applying those standards to the redistricting plan in *Kirksey*.

A federal district court in the District of Columbia has similarly applied the standards developed in multimember district cases to single-member district complaints. *See* Beer v. United States, 374 F. Supp. 363, 394 n.254 (D.C. 1974), *vacated and remanded on statutory grounds*, 425 U.S. 130 (1976).

64. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

65. 554 F.2d at 144.

66. 554 F.2d at 146.

67. 554 F.2d at 146-47.

68. 554 F.2d at 148.

69. 554 F.2d at 148 n.16. For support for its decision, the court analogized to the school desegregation case of Green v. County School Bd., 391 U.S. 430 (1968), in which the Supreme Court placed upon a formerly de jure segregated school district an affirmative duty to disestablish the dual system. The Supreme Court then invalidated a "freedom of choice" plan for assigning students to schools because, though not itself objectionable, it served to perpetuate segregation rather than end it.

The adamant tone of *Kirksey* notwithstanding, the Fifth Circuit did not sufficiently explain its holding in that case or its assertion that *Washington* and *Arlington Heights* are free of any suggestion that past intentional discrimination may constitutionally be perpetuated by neutral official action. The court argued that *Washington* and *Arlington Heights*

> would be of particular significance in the present case if the only issue were whether the racially neutral plan *created* such exclusion [from the political process] in Hinds County. But there is a second issue which we have pointed out, whether the plan, though neutral in design, was the instrumentality for carrying forward patterns of purposeful and intentional discrimination that already existed in violation of our Constitution.[70]

The Supreme Court's holdings are not that narrow, however. *Washington* demands that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[71] Contrary to the *Kirksey* court's assertion, nothing in *Washington* or *Arlington Heights* limits that principle to laws or official acts allegedly *creating* racial discrimination, as opposed to laws or acts allegedly *perpetuating* racial discrimination. Perhaps the Fifth Circuit meant that in adopting the districting plan the defendant board of supervisors consciously intended to perpetuate a denial of access to the political process. However, it is certainly arguable that such an intent satisfies *Washington*'s requirement, even though the plan itself was designed according to wholly neutral criteria. The court, then, had no reason to hold *Washington* inapposite.

If, however, the court meant that the defendant board acted without any improper motive, and that the scheme should be invalidated nonetheless because it perpetuated the past intentional discriminations not only of past boards but also of others unrelated to this board, then more explanation is needed, for that holding stretches the concept of intent beyond its normally understood meaning. Perhaps the *Kirksey* court read *Washington*'s intent requirement as saying that, although an invidious law must be rooted in intentional discrimination, the intentional discrimination that taints the law may be something other than the motivation underlying the law's passage or subsequent retention. Thus, where a districting plan that perpetuates a past intentional denial of political participation is passed

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70. 554 F.2d 139, 147 (5th Cir.) (en banc) (emphasis original), *cert. denied*, 434 U.S. 968 (1977).

71. 426 U.S. at 240.

with a wholly nondiscriminatory intent, or where such a plan is retained for wholly permissible reasons, the plan is sufficiently associated with and tainted by the past intentional denial to be said to have an invidious quality traceable to intentional discrimination. But that interpretation comes close to the very argument the Supreme Court rejected in *Washington*: "that a law or other official act . . . is unconstitutional *solely* because it has a racially disproportionate impact."[72] In almost any context, a disproportionate burden upon blacks can ultimately be traced to some intentional discrimination. This Note will argue in Part III that *Washington* can be satisfied by a racially selective indifference, even absent a conscious discriminatory purpose in the passage or retention of the law.[73] The court may have been essaying a similar argument in *Kirksey*, but, by failing to limit its concept of intent, it re-invoked, at least to some extent, the rejected disproportionate-effect standard.

It is curious that the next two Fifth Circuit cases, *David v. Garrison*[74] and *Parnell v. Rapides Parish School Board*,[75] neither mentioned *Washington* nor inquired into discriminatory intent. Both cases relied on the factors developed in *Zimmer* to evaluate claims that multimember districts dilute minority voting strength.[76] And though the court in *Parnell* listed "motivation for the districting scheme" as one of the factors to be considered under *Zimmer*,[77] both the *David* and *Parnell* courts based their investigations of constitutionality squarely on the effect of multimember districting, not on the motivation behind it.

The most thorough analysis to date of the post-*Washington* vote dilution doctrine came in four multimember district cases recently decided together.[78] In the most important of those four cases

72. 426 U.S. at 239 (emphasis original).

73. *See* text at note 111 *infra*.

74. 553 F.2d 923 (5th Cir. 1977).

75. 563 F.2d 180 (5th Cir. 1977).

76. In *David*, the court determined that a district court finding that an at-large election plan was unconstitutional was not supported by adequate findings of fact. In *Parnell*, the court upheld the district court's finding that certain multimember districts unconstitutionally diluted black voting power.

77. 563 F.2d at 184. To suggest that the "motivation of the districting scheme" is one of the factors to be considered under *Zimmer* is misleading. At least prior to *Washington*, *Zimmer* did not require discriminatory intent for a finding of vote dilution. It did assert that a multimember district must be invalidated if "the state policy favoring multimember or at-large districting schemes is rooted in racial discrimination." 485 F.2d at 1305. It also stated that "a tenuous state policy underlying the preference for multimember or at-large districting" helps to establish the fact of dilution. 485 F.2d at 1305. It did not, however, suggest that either is necessary before the court may hold a multimember district unconstitutional. *But see* Nevett v. Sides, 571 F.2d 209, 220-21 (5th Cir. 1978).

78. Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Bolden v. City of Mobile, 571 F.2d 238

—*Nevett v. Sides*[79]—the court held that the *Washington* intent requirement does apply to claims of racial vote dilution in multimember districts.[80] After discussing *Whitcomb, White,* and *Zimmer* and after reiterating *Washington*'s holding, the panel said, "The language of the Court in *Davis* and *Arlington Heights* is unambiguous and admits of no exception. Analytically, nothing about at-large districting legislation suggests that it should be treated differently from any other manifestation or official action that may impact groups of people differentially."[81] The court then asserted that the Fifth Circuit's prior vote dilution cases are consistent with that holding, since *Zimmer* "impliedly recogniz[es] the essentiality of intent in dilution cases by establishing certain categories of circumstantial evidence of intentional discrimination."[82] Moreover, the court held that circumstantial evidence will satisfy the intent requirement "[w]hether invidious discrimination motivates *the adoption or maintenance* of a districting scheme or whether the plan furthers preexisting purposeful discrimination."[83] After examining the district court's application of the *Zimmer* factors to the voting scheme in question, the panel affirmed the decision that the scheme did not dilute the black plaintiffs' vote.[84]

The *Nevett* court, after examining a line of cases from *Reynolds v. Sims*[85] (the landmark apportionment decision) through *Whitcomb*, to *White* and *Zimmer*, concluded that racial vote dilution in

(5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978) (per curiam).

Nevett was on appeal before the Fifth Circuit for the second time and was therefore labelled by the court *Nevett II*. This Note will refer to it simply as *Nevett*. On the first appeal, the Fifth Circuit had reversed and remanded a district court decision for the black plaintiffs. 533 F.2d 1361 (5th Cir. 1976).

79. 571 F.2d 209 (5th Cir. 1978).

80. 571 F.2d at 215. Judge Wisdom specially concurred in Judge Tjoflat's opinion. Although he agreed that the black plaintiffs had not been the victims of unconstitutional vote dilution, he argued that it would not be inconsistent with *Washington* or *Arlington Heights* to prohibit vote dilution "without proof of racial discriminatory purpose." 571 F.2d at 231.

81. 571 F.2d at 218. The court held that discriminatory purpose is essential to a fifteenth amendment as well as a fourteenth amendment claim.

82. 571 F.2d at 215.

83. 571 F.2d at 221 (emphasis added).

84. 571 F.2d at 229. The court disposed of the three other consolidated cases according to the principles established in *Nevett*. *Bolden v. City of Mobile* branded the challenged at-large scheme, which had been adopted in 1911, "archetypal of the intentionally maintained plan" condemned in *Nevett*. 571 F.2d 238, 246 (5th Cir. 1978). Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978), and Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978) (per curiam), were both remanded for determinations under *Nevett*'s reading of *Zimmer* whether there had been intentional discrimination.

85. 377 U.S. 533 (1964).

multimember districts does not differ from any other differentially impacting official act. Part III of this Note suggests that that conclusion is wrong because the court failed to examine *Fortson v. Dorsey*,[86] a case decided between *Reynolds* and *Whitcomb*, which first recognized the racial vote dilution claim.[87] The *Nevett* court thus misunderstood, as have all the lower courts dealing with this problem, the nature of the multimember-district vote-dilution claim.

Moreover, the court's conclusion that a discriminatory purpose in either the adoption or maintenance of a districting scheme satisfies *Washington* answers the problem of intent in vote dilution claims only partially. Despite its statement that the intent requirement may be satisfied where the districting plan merely "furthers preexisting purposeful discrimination,"[88] the *Nevett* panel apparently read *Kirksey* as involving a districting scheme adopted with the conscious purpose of carrying forward past intentional discrimination.[89] That reading leaves unresolved the more difficult problem suggested by *Kirksey*: Whether, given the intent requirement, a finding that a districting scheme which dilutes minority votes was designed, and passed or maintained, wholly without a conscious intent to discriminate, forecloses a holding of unconstitutional vote dilution.

Thus, after one Fifth Circuit panel accepted *Washington* in *Paige*, the circuit en banc attempted to limit its applicability in *Kirksey*. A third panel ignored *Washington* in *David* and *Parnell* before a fourth again accepted *Washington* and applied it to the vote dilution doctrine in *Nevett*. None of these cases, however, explored in sufficient detail the ways in which the *White* test can be reconciled with *Washington*'s intent requirement, and none satisfactorily explained why *White* should be exempt from that requirement. Part III of this Note treats those matters.

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86. 379 U.S. 433 (1965).

87. *See* text at note 140 *infra*.

88. 571 F.2d at 221.

89. In reference to *Kirksey*, the *Nevett* court said, "Where the plan [that perpetuates past intentional discrimination] is maintained with the purpose of excluding minority input, the necessary intent is established, and the plan is unconstitutional. We so hold today in Bolden v. City of Mobile." 571 F.2d at 222. In *Bolden*, the court cited specific evidence of intent, including a legislative attempt to justify on non-racial grounds and thereby perpetuate the challenged at-large system, and the legislature's acute awareness of the racial consequences of its districting policies. 571 F.2d at 246. These are examples of a conscious discriminatory intent.

III. THE *White* TEST AFTER *Washington*

As suggested by the survey both of post-*Washington* Supreme Court references to *White* and of lower court reactions to the intent requirement in vote dilution cases, the status of the *White* test for multimember districts is unclear. This Note attempts to reconcile *White* and *Washington* by suggesting two ways in which some of the factors listed in *White* may provide circumstantial evidence of purposeful discrimination. The Note argues further, however, that *White* should be viewed as unaffected by *Washington* for two reasons. First, because it was designed as a protection of the right to vote as defined in *Reynolds v. Sims*,[90] the effect-oriented test in *White* falls within a traditional fundamental interest analysis unchanged by *Washington*'s requirement of intent in racial discrimination claims. Second, even if it is viewed more narrowly as protection only against a form of racial discrimination, the test in *White* does not depend upon the type of disproportionate-impact analysis rejected in *Washington*. Rather, the impact required to satisfy *White* falls solely upon the racial minority in question and is analogous to a type of impact-oriented standard apparently approved in *Washington*.

A. *Reconciling* White *and* Washington: *Circumstantial Evidence of Purposeful Discrimination*

1. *The* White *Test as an Indicator of Conscious Discriminatory Purpose*

The Fifth Circuit panel in *Nevett v. Sides* held that some of the factors listed in *White* and *Zimmer* provide circumstantial evidence that an electoral scheme was adopted or maintained for the purpose of impairing minority voting strength.[91] That holding follows logically from the Supreme Court's statements. *Washington* does not require "that the necessary discriminatory racial purpose must be express or appear on the face of the statute."[92] An invidious discriminatory purpose, according to *Washington*, "may often be inferred from the totality of the relevant facts."[93] Moreover, the historical background of, and the specific events leading to, the law or official

90. 377 U.S. 533 (1964).

91. 571 F.2d 209, 221-25 (5th Cir. 1978). *Accord, The Supreme Court, 1976 Term, supra* note 31, at 289 n.32.

92. 426 U.S. at 241.

93. 426 U.S. at 242.

act are two of the relevant indicators of intent listed by the Supreme Court in *Arlington Heights*.[94] The actual impact of the law is, of course, a third indicator.[95] All these kinds of evidence are considered under the tests announced in *White*[96] and *Zimmer*,[97] along with other facts, to determine whether, in light of "the totality of the circumstances,"[98] a multimember district dilutes minority voting strength.

Paige v. Gray[99] illustrates how circumstantial evidence can show that an electoral scheme was adopted with a discriminatory intent. In that case, the historical background of the adoption of an at-large election scheme included the facts that Georgia's all-white primaries had recently been struck down and that a black-favored candidate had been elected shortly thereafter.[100] The impact of the at-large scheme was readily apparent: no black had ever been elected under it.[101] On those facts, the court could have reasonably held that sufficient circumstantial evidence existed to show that the at-large system was adopted in order to impair black voting stength.[102] The plain-

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94. 429 U.S. at 267-68.

95. 429 U.S. at 266.

96. 412 U.S. at 766-69.

97. 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *affd. per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

98. 412 U.S. at 769.

99. 538 F.2d 1108 (5th Cir. 1976).

100. 538 F.2d at 1109.

101. 538 F.2d at 1109.

102. Because the Fifth Circuit remanded *Paige* to the district court for evaluation under *White* and *Zimmer* rather than under *Gomillion, see* text at notes 59-61 *supra*, it did not "reach the question of whether the sequence of events leading to the passage of the [at-large system] was sufficiently suspect to compel a finding of racial motivation." 538 F.2d at 1110.

The substantiality of the circumstantial evidence necessary to prove purposeful discrimination may vary slightly in different contexts. For example, the Supreme Court noted in Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252 (1977), that "[b]ecause of the nature of the jury-selection task . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*." 429 U.S. at 266 n.13. *See* text at note 119 *infra*. In a case decided only shortly thereafter, the Court inferred purposeful discrimination from a bare statistical disparity between the number of Mexican-Americans called to serve as grand jurors and the proportion of Mexican-Americans in the local population. Castaneda v. Partida, 430 U.S. 482, 494 & n.13 (1977). It may well be that the claim of racial vote dilution in a multimember district is another context in which an acceptance of somewhat less substantial evidence may be appropriate. As explained in Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 28-29 (1976):

> [I]t often is difficult to determine whether a decision was discriminatorily motivated. If courts may grant relief only when plaintiffs have made a clear case on the record, many instances will remain where race-dependent decisions are strongly suspected but cannot be proved. Although this is not essentially different from the difficulty facing the proponents in most litigation seeking to overturn government policies, it is especially troubling in the race area. The accumulation of suspected but unproved race-dependent conduct . . . may systematically deprive minorities of important benefits. And the very existence

tiffs would, of course, then have to bring forth evidence of other factors listed in *White* to show that the system had diluted minority voting strength.

In most multimember district challenges, minority voters could produce circumstantial evidence that the district was adopted for the purpose of diluting the minority vote.[103] Such a motive could not, however, be proved in all such cases, for many currently dilutive districting plans were initially adopted under "race-proof" circumstances when blacks were effectively disenfranchised.[104] Thus, the argument runs, the plan could not have been adopted with a discriminatory intent.

Bolden v. City of Mobile[105] illustrates that circumstantial evidence can show that an electoral scheme, although adopted for neutral reasons, is maintained with the discriminatory intent of impairing minority voting strength. The at-large plan in *Bolden* had been enacted in 1911, when blacks were disenfranchised by the Alabama constitution.[106] The evidence revealed, however, that no black candidate had ever been elected, that voting was racially polarized, that the legislature was unresponsive to black needs, and that election rules further impaired black voting strength.[107] From that alone a court might infer that the plan was maintained for a discriminatory purpose. Moreover, and equally important, recent legislative attempts to perpetuate the at-large system, and the district court's finding that the legislature was "acutely conscious of the racial consequences of its districting policies,"[108] strongly suggest that the election plan, although passed in "race-proof" circumstances, was intentionally maintained to dilute minority voting strength once the plan began to have that effect.

The *Nevett* court did not make clear, however, the scope of its holding that circumstantial evidence of an intentional adoption or

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of a state of affairs which "everyone knows" is based on racial discrimination but no one will remedy is demoralizing and stigmatic.
(Footnote omitted.)

103. Many of the multimember districts in the South were adopted soon after black voter registration was greatly increased by the passage of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified in 42 U.S.C. § 1971, 1973 to 1973bb-4 (1970)). *See* U.S. COMMN. ON CIVIL RIGHTS, *supra* note 9, at 21-24. That alone should raise suspicions about the purpose of these enactments.

104. *E.g.*, Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978) (at-large system established in 1911); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978) (per curiam) (at-large system established in 1898).

105. 571 F.2d 238 (5th Cir. 1978).

106. 571 F.2d at 245.

107. 571 F.2d at 243-44.

108. 571 F.2d at 246.

maintenance of a dilutive districting satisfies *Washington*. Specifically, though it reads *Kirksey* as meaning that "an innocently formulated plan that perpetuates past intentional discrimination is unconstitutional,"[109] it does not resolve the ambiguity of *Kirksey*'s holding: Must the legislature adopting or maintaining a plan be aware of the dilutive effect and consciously intend to perpetuate that effect? Or does it suffice that the legislature, without a conscious discriminatory intent of its own, perpetuates the discriminatory intent of past legislatures and of others? The language of *Nevett* suggests that the court meant to require a conscious intent to impair minority votes.[110] This Note argues, however, that the concept of intent should be broader and that a racially selective indifference should satisfy the requirement of purposeful discrimination.

2. *The* White *Test as an Indicator of Selective Racial Indifference*

The Supreme Court did not define "purposeful discrimination" in *Washington* or *Arlington Heights*.[111] The *Nevett* approach to reconciling the *White* and *Zimmer* test with *Washington* apparently assumes that only a conscious purpose to impair minority voting strength is sufficiently invidious to satisfy the purposeful discrimination requirement. That approach then suggests that at least some of the factors listed in *White* will reveal such a purpose. The initial assumption of that approach, however, may not be fully justified. Nothing in those cases indicates that the term is limited to racial animus,[112] and it is certainly arguable that purposeful racial discrimination may appear in forms other than racial antagonism.[113] Decisions based on "racially selective sympathy and indifference,"[114] like decisions based on racial hostility, assume a differential worth of ra-

109. The quotation is from Bolden v. City of Mobile, 571 F.2d 238, 246 (5th Cir. 1978). The panel that decided *Bolden, Nevett* and two other consolidated cases, is referred to by the name of the most important case for convenience only.

110. *See* note 89 *supra*.

111. *See The Supreme Court, 1976 Term, supra* note 31, at 174 n.70.

112. It is argued in *The Supreme Court, 1976 Term, supra* note 31, at 174 n.170, that purposeful discrimination cannot "simply be racial animus; even clearly unconstitutional laws may have been prompted not by a desire to harm blacks but by the belief that the good of both races requires segregation."

113. Brest, *supra* note 102, at 7.

114. *Id.* Professor Brest defines "racially selective sympathy and indifference" as "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group." *Id.* at 7-8. *See The Supreme Court, 1976 Term, supra* note 31, at 174: "The use of racial stereotypes may be unconscious, and legislators may discount the burdens a measure imposes on a minority group without being aware that they are doing so." (Footnote omitted).

cial groups.[115] Both decisions are unfair, "for by hypothesis, they are decisions disadvantaging minority persons that would not be made under the identical circumstances if they disadvantaged members of the dominant group."[116] Thus, "purposeful discrimination" may be defined to include decisions that reflect a selective racial indifference as well as those that reflect racial hostility.[117]

Rather than explore the meaning of "purpose" when faced with election districting cases, lower federal courts[118] have been fond of quoting Justice Stevens' remark in his concurring opinion in *Washington* that "when the [disproportionate impact] is as dramatic as in *Gomillion v. Lightfoot* . . . or *Yick Wo v. Hopkins*, . . . it really does not matter whether the standard is phrased in terms of purpose or effect."[119] However, the disproportionate impact of a redrawn boundary that excludes from the city all the blacks but none of the whites, as in *Gomillion*, or of the enforcement of an ordinance against 150 Chinese but against no whites, as in *Yick Wo*, can be quantified in a manner that the impact of multimember districts cannot. Thus, the invidious impact of a multimember district is never as immediately obvious as the invidious discrimination in *Gomillion* and *Yick Wo*.

More helpful may be Justice Stevens' recognition of the problem of defining "purposeful discrimination": even though the requirement of purposeful discrimination "is a common thread" running through racial discrimination cases,[120] the Court has never defined the term. Indeed, what constitutes "purposeful discrimination" may be different in different cases. After summarizing the various cases discussed in the majority opinion in *Washington*, Justice Stevens suggested that:

> [a]lthough it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.[121]

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115. Brest, *supra* note 102, at 8.

116. *Id.*

117. *Id.* at 7.

118. *See* Paige v. Gray, 538 F.2d 1108, 1110 n.3 (5th Cir. 1976); Paige v. Gray, 437 F. Supp. 137, 160 (M.D. Ga. 1977); Brown v. Moore, 428 F. Supp. 1123, 1127 (S.D. Ala. 1976).

119. 426 U.S. at 254 (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

120. 426 U.S. at 253 (concurring opinion).

121. 426 U.S. at 253 (concurring opinion).

Thus, a prima facie showing of a purposeful discrimination in an election districting claim need not require proof of a conscious intent to dilute minority voting strength. If a legislature regards the impact of a districting scheme with an insensitivity that would not be present if the scheme were disadvantageous to white rather than black voters, then the adoption or retention of that scheme should constitute purposeful discrimination. So defined, purposeful discrimination can be proved with circumstantial evidence like that in *White*: a history of official discrimination—political and otherwise—and a lack of good-faith concern by the legislature for minority interests.[122] Both factors suggest racially selective indifference, if not racial antagonism, on the part of the legislature. Where these factors in combination with other factors listed in *White*[123] demonstrate that the districting scheme in question dilutes minority voting strength, an equal protection claim, complete with purposeful discrimination, has been established.

This interpretation of *Washington*'s intent requirement resolves

122. 412 U.S. at 766-69. One commentator has suggested that the relevance of historical discrimination or of discrimination in social contexts not directly related to voting "can be explained only insofar as these elements support a finding of purposeful discrimination" underlying the adoption of the election scheme. Note, *supra* note 50, at 380 n.137. On the other hand, the Fifth Circuit has held that no causal relationship need exist between past social and political discrimination and a denial of access to the political process since "[i]nequality of access is an inference which flows from the existence of economic and educational inequalities." Kirksey v. Board of Supervisors, 554 F.2d 139, 145 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977).

The commentator's statement is too narrow. Past discrimination can hinder minority political participation in a variety of ways. The inferior education almost inevitable in a de jure dual school system can reduce the number of minority citizens educationally prepared to participate in politics effectively. Moreover, in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973), the Supreme Court did not dispute the assertion that inferior education hinders the "intelligent utilization of the right to vote." Discrimination in employment may limit the number of minorities financially able to seek office or to support a candidate. Stringent or unfairly administered voter registration laws may leave many potential minority voters with no vote at all. More generally, pervasive discrimination may imbue many minority voters with a sense that voting is futile. *Cf. Kirksey*, 554 F.2d at 145 (white bloc voting may lead blacks to consider registration futile). Thus, evidence of past discrimination is probative of more than simply the likelihood that the enactment of a particular election scheme was discriminatorily motivated.

On the other hand, the Fifth Circuit's statement in *Kirksey* is too broad: a denial of access to the political process should not be inferred from every instance of racial discrimination. *But see* Yelverton v. Driggers, 370 F. Supp. 612, 618 (M.D. Ala. 1974), where the fact that city recreational centers and the Boy's Club were racially segregated was deemed relevant to the black voters' challenge to a multimember district. The issue is noted in Brest, *supra* note 102, at 35: "When an act of discrimination denies its victims a benefit (*e.g.*, the right to vote), a finding that the present state of affairs (the disproportionately small number of blacks registered to vote) was caused by past discrimination is tantamount to a determination that past discrimination inflicts present injuries."

123. *E.g.*, a small number of successful minority-preferred candidates; racial bloc voting; racial campaign tactics; a large multimember district; majority, place, or anti-single shot rules; restrictive voter registration requirements; and cultural or language barriers that make community participation difficult. *See* 412 U.S. at 766-69.

the ambiguity of *Kirksey*'s holding.[124] It is unclear whether the *Kirksey* court held that the defendant board of supervisors had consciously perpetuated past intentional discrimination when it adopted the districting plan. Nonetheless, the plaintiffs "presented substantial unrefuted evidence showing a past record of racial discrimination engaged in by the county and of official unresponsiveness to the needs of the county's black citizens."[125] In light of these facts, the court could reasonably infer that the challenged districting scheme, which perpetuated a denial of political participation even though drawn and adopted without a conscious discriminatory intent, was enacted with a selective racial indifference and would not have been enacted had it disadvantaged white rather than black voters. Similarly, the plaintiffs in *Bolden* presented evidence of past discrimination[126] and official unresponsiveness.[127] Although the vote-dilutive, at-large system in that case had been adopted when blacks had no vote, the court could infer from the totality of the relevant facts that the *retention* of the at-large system evidenced a racial insensitivity sufficient to satisfy the purposeful discrimination requirement.[128]

This is not to say that all legislative acts may be condemned because of past injustice. A mere history of discrimination and unresponsiveness to minority interests should not bar the legislature from adopting a districting scheme based upon valid motives. But where plaintiffs can show that the debilitating effects of past discrimination continue to inhibit minority political participation and that the legislature has been unresponsive to minority interests in the relatively recent past, it is logical to conclude that the adoption or retention of a district plan that perpetuates a denial of minority access to the political process reflects a selective racial indifference and should be invalidated as purposeful racial discrimination.

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124. *See* text at notes 88-89 *supra*.

125. 554 F.2d at 143-44.

126. 571 F.2d at 243.

127. 571 F.2d at 243.

128. Surely racial insensitivity constituting purposeful discrimination can be manifested through inaction as well as action. It is naive to suppose that legislators are unaware of the impact that the districting scheme under which they were elected has upon voting strength. Where a districting scheme minimizes the voting strength of an element of the electorate, it can be inferred that the legislators are indifferent toward that element. They would obviously not be indifferent if the district had the same impact upon voters of the dominant group. Thus, a finding of purposeful discrimination would not be incongruous with the fact that the districting scheme in question was adopted at a time when blacks were disenfranchised, and has been unchanged since.

B. *Immunizing* White *from* Washington: *Vote Dilution as Infringement of a Fundamental Interest*

The Supreme Court may eventually clarify its notion of "purposeful discrimination." If the Court decides that selective racial indifference does not constitute purposeful discrimination, the problems raised by *Kirksey* will remain unresolved so long as *White* must be reconciled with *Washington*. The multimember district cases can be seen as unaffected by *Washington*, however, if they are viewed as relying upon fundamental interest analysis, a branch of the law of equal protection unchanged by that case.

1. *Suspect Classifications and Fundamental Interests*

Absent compelling justification, the equal protection clause prohibits state action that discriminates against "suspect classifications," such as racial or ethnic groups, or that significantly infringes upon a fundamental interest.[129] *White*, as yet the only Supreme Court decision declaring a multimember district unconstitutional, appeared to involve both racial discrimination and a fundamental interest.[130] The Court in *White* did not say, however, whether it conceptualized the issue as involving racial discrimination, the fundamental interest of voting, or both;[131] the Court's language is ambiguous. The Court focused on the racial minority plaintiffs in noting that in prior cases it had "entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of *racial groups*."[132] More broadly, however, it required challengers of multimember districts to show that "the political processes leading to nomination and election were not equally open to participation by the *group in question*."[133]

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129. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088, 1120 (1969).

130. Voting is clearly a fundamental interest. According to the Supreme Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973), only those rights "explicitly or implicitly guaranteed by the Constitution" are deemed fundamental. In Dunn v. Blumstein, 405 U.S. 330, 336 (1972), the Court stated that it "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964).

131. The multimember district cases have not expressly invoked the standard equal protection analysis of restrained or active review, suspect classification or fundamental interest. One commentator has suggested that the Court in *White* implicitly treated the multimember district as both a burden upon a suspect class and an infringement upon a fundamental interest. The commentator then inferred that the Court applied a strict scrutiny standard and failed to find a compelling state interest. *See* Note, *supra* note 50, at 372-73.

132. 412 U.S. at 765 (emphasis added).

133. 412 U.S. at 766 (emphasis added).

It is not clear from *White* alone, therefore, whether the Court conceptualized a multimember district that dilutes racial voting strength as a type of racial discrimination or as a type of infringement upon the fundamental right to vote.[134] The distinction is significant because it may help resolve the uncertainty about the relevance of intent and effect in multimember district challenges. The Supreme Court has generally insisted upon proof of discriminatory intent in racial discrimination cases, but it has been satisfied with proof of a significant infringement in fundamental interest cases.[135] It is necessary, then, to determine which approach to equal protection analysis the Court has used in multimember district decisions.

Briefly stated, racially motivated laws or official acts are presumed to be invidious because they commonly rest upon generalized, irrational assumptions of the differential worth of racial groups and often impose upon the minority a stigma of inferiority or the frustration of an injury inflicted because of an immutable, inherited personal trait.[136] Of course, stigma and frustration may result as well from disadvantaging decisions that were not racially motivated. Differentiation between individuals is necessary, however, and a presumption against all differentiations that stigmatize or frustrate regardless of intent or rationality would affect "an enormously wide range of practices important to the efficient operation of a complex industrial society."[137] The presumption of invalidity is limited, therefore, to decisions based upon race, since they are both harmful because they stigmatize and of little social value because they are too often irrational.[138]

In fundamental interest cases, the Court is concerned with the interference with a right explicitly or implicitly guaranteed by the Constitution.[139] Whether a challenged law or act is invidious depends upon the significance of the interference.[140] Intent is less im-

134. *But see* Justice Brennan's characterization in United Jewish Organizations v. Carey, 430 U.S. 144, 170 (1977) (concurring opinion), of Whitcomb v. Chavis, 403 U.S. 124 (1971), as involving a suspect classification. Neither *Whitcomb* nor any of the Supreme Court multimember decisions have ever invoked the suspect classification analysis, however.

135. *Compare, e.g.*, Washington v. Davis, 426 U.S. 229 (1976), *with* Zablocki v. Redhail, 434 U.S. 374 (1978).

136. Brest, *supra* note 102, at 6-12.

137. *Id.* at 11.

138. *Id.*

139. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

140. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

portant in fundamental interest cases because, unlike racially motivated laws, the statutes or acts in question are not suspected either of resting on irrational assumptions about the differential worth of racial groups or of imposing any stigma or frustration upon a minority group. The concern in these cases is that the statute or act may unjustifiably interfere with a fundamental interest possessed by most citizens. Therefore, rather than examining the law's underlying intent, the Court evaluates the potential state interests supporting the law. Where the interference is substantial, the statute will be upheld only if it is supported by "sufficiently important state interests and is closely tailored to effectuate only those interests."[141]

2. *Multimember Districting as an Infringement of a Fundamental Interest*

The origin and development of the multimember district problem suggest that, although thus far only racial or ethnic minorities have successfully challenged multimember districts, the Supreme Court views the problem as an infringement on the fundamental right to vote and is willing to hear challenges by members of political as well as racial groups. So viewed, the Court's emphasis in *White* on effect is understandable. Moreover, if *White* is seen as a fundamental interest case, it is unaltered by *Washington*, which, of course, dealt with a suspect classification.

The landmark case in apportionment and districting is *Reynolds v. Sims*,[142] which stated that "the right of suffrage is a fundamental matter in a free and democratic society."[143] The right to vote is fundamental because "representative government is in essence self-government through the medium of elected representatives."[144] Thus,

> each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.[145]

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141. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

142. 377 U.S. 533 (1964).

143. 377 U.S. at 561-62.

144. 377 U.S. at 565.

145. 377 U.S. at 565. The rule of *Reynolds* was applied to local governmental units in Avery v. Midland County, 390 U.S. 474, 480 (1968): "Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts

The right to vote, then, is the right to full and effective participation in the political process. To assure each citizen an equally effective voice, the Court in *Reynolds* held that, in apportionment plans, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen."[146]

Less than one year later, in *Fortson v. Dorsey*,[147] the Supreme Court faced the allegation that citizens who lived in districts substantially equal in population to all other districts in the state, but who joined with citizens from other districts in their county to elect several representatives at large, were denied a vote "approximately equal in weight" to the vote of those citizens who simply elected one representative from their district.[148] The plaintiffs claimed that the multimember districts violated the rule in *Reynolds* "because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted."[149] The Court was unpersuaded: "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. . . . [S]ince his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county . . . ."[150] The Court added in dicta, however, that its opinion

> is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[151]

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specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process."

146. 377 U.S. at 579.

147. 379 U.S. 433 (1965).

148. 379 U.S. at 436-37. The Georgia senatorial apportionment plan attacked in *Fortson* created 54 districts. Thirty-one districts each contained from one to eight counties. The remaining 21 districts were located in the seven most populous counties, with each of these counties containing from two to seven districts. The 21 districts were created for the purpose of a representative residence requirement only: the voters in these districts joined with the voters of the other districts in the county to elect all the county's senators at large. 379 U.S. at 435.

149. 379 U.S. at 437.

150. 379 U.S. at 438.

151. 379 U.S. at 439.

The implication seems clear. In some multimember districts, unlike the district in *Fortson*, the representatives' success will not depend upon the district-wide electorate. Where multimember districting allows representatives to ignore the interests of a particular element of the voting population, then the voting strength of that element has been cancelled out. Perhaps at the time of *Fortson* the Court only vaguely sensed those circumstances in which a multimember district would render the support of particular groups unimportant in this manner. The subsequent cases have shown that the minimization of voting strength may occur where the district-wide population is large in comparison to the size of the group in question, where past or present discrimination inhibits that group's general political participation, or where electoral rules increase the difficulty of electing a minority-supported candidate.

Fortson suggested that the right to full and effective participation in the political process—the fundamental right established in *Reynolds*—may be violated by a cancelling out of voting strength in a multimember district as well as by an inequality of population among single-member districts. Inquiry into the multimember district problem necessarily involved "the practical realities of representation,"[152] rather than the simple mathematical comparison of populations among single-member districts. But the goal of the inquiry was the same in both cases: to ensure an equally effective voice in the political process. It appears, therefore, that the Supreme Court conceptualized the multimember district problem as a threat to the fundamental right to vote, not strictly as a potential form of racial discrimination.

The Court in *Fortson* correctly noted that racial minorities are the most likely victims of a minimization of voting strength. Its reference to "racial or political elements"[153] should not be read, however, as limiting the vote dilution claim to those groups. Because those are the groups whose members are most likely to vote only for members of the same group, they are the groups in greatest danger of vote dilution. Nonetheless, the voting strength of other types of groups could be minimized in a multimember district. If so, the fundamental right of those voters would be violated as well.

The Court's approach to multimember district challenges has not changed since *Fortson*. In *Whitcomb v. Chavis*,[154] the Court quoted

152. 379 U.S. at 437-38.

153. 379 U.S. at 439.

154. 403 U.S. 124 (1971).

the *Reynolds* principle that " '[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice' " in the political process.[155] The Court also repeated the "racial or political elements" statement of *Fortson*.[156] The language in *White* is ambiguous,[157] but in *Gaffney v. Cummings*,[158] argued and decided on the same days as *White*, the Court again quoted the *Fortson* reference to "racial or political elements." Later cases further reveal that the Supreme Court still views vote dilution in multimember districts broadly as an infringement upon the fundamental right to vote, not narrowly as a form only of racial discrimination. In *Dallas County v. Reese*,[159] decided two years after *White*, the Court reiterated that a multimember district will be vulnerable if it "in fact operates impermissibly to dilute the voting strength of an *identifiable element* of the voting population."[160] And most recently in *United Jewish Organizations v. Carey*,[161] the Court again reaffirmed that districting plans will be subject to attack if they minimize the voting strength of "*racial or political groups.*"[162]

Although *Washington* sharpened the focus upon discriminatory intent in racial discrimination claims, it did not shift the focus from the significance of the infringement in fundamental interest claims.[163] Indeed, the most recent fundamental interest case,

155. 403 U.S. at 141 (quoting 377 U.S. at 565).

156. 403 U.S. at 143.

157. *See* text at notes 130-33 *supra*.

158. 412 U.S. 735, 751 (1973) (quoting *Fortson*, 379 U.S. at 439).

159. 421 U.S. 477 (1975) (per curiam).

160. 421 U.S. at 480 (emphasis added). The plaintiffs in *Dallas County* were urban voters who alleged that their voting strength was minimized because, under the electoral statute, only one representative could be elected from their district in a county-wide at-large election even though that district comprised almost one half the four-district county population. The Supreme Court's rejection of that claim rested upon *Fortson*: so long as the districts were a basis for residence only, and not for representation, the elected representatives had to be vigilant to serve all the voters in the county. The Court made it clear, however, that urban voters could successfully attack a multimember district if it in fact minimized their voting strength. 421 U.S. at 480.

161. 430 U.S. 144 (1977).

162. 430 U.S. at 167 (emphasis original). As a practical matter, racial or ethnic groups are more likely than political groups to challenge a multimember district successfully. Racial discrimination, bloc voting, and large districts all increase the possibility that the interests of racial or ethnic groups within the multimember district can be ignored. These are the types of "practical realities of representation in a multi-member constituency," Fortson v. Dorsey, 379 U.S. 433, 437-38 (1965), that the Supreme Court demands as proof of vote dilution. That a nonracial political group can marshal sufficient evidence to prove that a multimember district submerges its voice is certainly not inconceivable, however.

163. The Supreme Court's statement in *Washington* of "the basic equal protection principle" is limited to racial discrimination claims: "[T]he invidious quality of a law *claimed to be racially discriminatory* must ultimately be traced to a racially discriminatory purpose." 426

Zablocki v. Redhail,[164] examined the alleged infringement at length without mention of *Washington*. It is logical to suggest, therefore, that the *White* test has not been altered by *Washington* and that the Supreme Court will not require proof of purposeful discrimination even when vote-dilution challenges to multimember districts are brought by racial groups.

C. *Distinguishing* White *and* Washington: *Vote Dilution as Discrimination Affecting Only Minorities*

Even if racial vote dilution in multimember districts is analyzed as a form of racial discrimination rather than as an infringement upon a fundamental interest, the *White* test might still be unaffected by *Washington*'s intent requirement. The Supreme Court's insistence upon purpose in racial discrimination claims derives in part from its concern over the impracticality of disproportionate-impact analysis. As the Court noted in *Washington*, if an otherwise neutral statute were held invalid, absent compelling justification, solely because "in practice it benefits or burdens one race more than another," then a whole range of governmental tests, qualifications, and fee schedules could be called into question, however rational or neutrally motivated they may be.[165]

Moreover, the Court's rejection of disproportionate-impact analysis rests upon at least two principles. The first principle, a presumption of rationality, was stated clearly in *Washington*: the Court will not review "the seemingly reasonable acts of administrators and executives" without some evidence that an impermissible consideration—such as racial discrimination—affected the decision challenged.[166] The second principle was not expressed in either decision but probably underlay both: the equal protection clause protects individuals, not groups,[167] and does not recognize a minority individual's sense of stigma or frustration as sufficiently harmful to invalidate a rational law applied neutrally to the majority of citizens where that stigma arises from the mere fact that a disproportionate number of those disadvantaged by the law happen to be of the same

U.S. at 240 (emphasis added). Surely it does not follow that the Court will focus as intently upon purpose in fundamental interest cases.

164. 434 U.S. 374 (1978) (right to marry).

165. 426 U.S. at 248 & n.14.

166. 426 U.S. at 247. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

167. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300-01 (1972).

minority.[168] The disproportionate impact may be great enough to suggest a discriminatory purpose,[169] but the Court in *Washington* rejected "the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[170]

At first glance, *Washington*'s rejection of disproportionate-impact analysis might appear to conflict with the test developed in *White* for determining vote dilution in multimember districts.[171] The *White* standard—which requires inquiry into the local history of racial discrimination, the responsiveness of the elected white officials, the success or failure of minority-supported candidates, the size of the district, and the presence or absence of majority, place, and anti-single shot rules[172]—clearly focuses on the impact of the multimember district on minority voting. Nonetheless, an examination of the Court's understanding of "disproportionate impact" suggests that the effect-oriented test of *White* is still sound. The language of *Washington* and the prior disproportionate-impact cases cited in that decision[173] reveal that the Court will not invalidate a prima facie neutral law where the law burdens more blacks than whites but does not burden an individual black more than a similarly situated white.[174] Where the law burdens only blacks, however, the Court will declare it unconstitutional.

The Supreme Court said in *Washington* that it had "recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act,"[175] citing *Jefferson v. Hackney*.[176] In *Jefferson*,

168. *But see* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 558 n.99 (1977):

> The relevant perspective is less that of the disadvantaged individual than the perspective of the entire racial minority. The *disproportionate* character of the disadvantage, because it constitutes a severe impediment to the racial minority in its difficult struggle to escape the legacy of slavery and oppression and to achieve real social equality, is especially burdensome.

(Emphasis original).

169. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis 426 U.S. 229, 242 (1976).

170. 426 U.S. at 239 (emphasis original). This rejection of disproportionate-impact analysis applies only to equal protection claims. Title VII, and perhaps other statutory claims, may still focus on impact alone. 426 U.S. at 239, 247-48.

171. *See The Supreme Court, 1976 Term*, *supra* note 31, at 289 n.32.

172. *See* 412 U.S. at 765-69.

173. *See* 426 U.S. at 241 (citing Jefferson v. Hackney, 406 U.S. 535 (1972); James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969)).

174. *See also* Goodman, *supra* note 167, at 306.

175. 426 U.S. at 240.

176. 406 U.S. 535 (1972).

the plaintiffs alleged that they were denied equal protection when the state, after establishing a pecuniary standard of need for all Social Security recipients, paid a different percentage of that standard to recipients of different grant programs.[177] The plaintiffs made no attempt to prove purposeful discrimination;[178] rather, they claimed that the payment scheme disproportionately affected blacks and Mexican-Americans because those minorities comprised a substantial majority of the grant class receiving the lowest percentage of the pecuniary standard.[179] The Supreme Court rejected this "naked statistical argument" since the "acceptance of appellants' constitutional theory would render suspect each difference in treatment among grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."[180] Clearly, the payment scheme disadvantaged more blacks and Mexican-Americans than whites. Those minorities were not the only persons disadvantaged, however; since the scheme's impact fell just as heavily on white recipients in the same grant class, no equal protection violation had occurred.

The Supreme Court in *Washington*[181] also suggested that *James v. Valtierra*[182] could be compared with *Hunter v. Erickson*.[183] These two cases reveal the distinction between impacts that offend the equal protection clause and those that do not. The complaint in *James* resembled that in *Jefferson*. The California Constitution provided that no low-income housing project could be developed by a state body until the project was approved by a majority of those voting in a community referendum.[184] Claiming that the impact of the law fell most heavily upon the urban poor and that a "disproportionally high percentage of racial minorities" comprised that group,[185] the plaintiffs alleged a denial of equal protection. By contrast, the

177. Recipients in the Aid to Families with Dependent Children program received 75% of the established standard. Those in the Aid to the Blind and the Aid for the Permanently and Totally Disabled programs received 95%. Recipients in the Old Age Assistance program received 100% of the standard. 406 U.S. at 545.

178. 406 U.S. at 547-48.

179. 406 U.S. at 548. The plaintiffs did not claim that the disproportionate impact was so dramatic that it implied purposeful discrimination.

180. 406 U.S. at 548.

181. 426 U.S. at 241.

182. 402 U.S. 137 (1971).

183. 393 U.S. 385 (1969).

184. 402 U.S. at 139.

185. Brief for Appellee Housing Authority of the City of San Jose at 7, James v. Valtierra, 402 U.S. 137 (1971).

plaintiffs in *Hunter* challenged the constitutionality of a city charter amendment, passed by the electorate, that required that any ordinance regulating property transactions "on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors."[186] In neither case did the plaintiffs attempt to prove racially discriminatory intent.[187]

The Court struck down the law challenged in *Hunter* and upheld the law contested in *James*. In *James*, the burden of the law fell on more minorities than whites, but it did not fall exclusively on minorities since the provision required "referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority."[188] In *Hunter*, the Supreme Court held that the challenged law "disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations" and that, "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."[189] Thus, *Hunter* was not a case of disproportionate impact as that term is understood in *Jefferson* and *James*, where the impact burdened individuals of various group identities but burdened proportionately more individuals of one group than any other. The burdening impact of the provision in *Hunter* fell solely on the minority since, as the Court realized, "[t]he majority needs no protection against discrimination."[190] And the Court declared that this type of burdening impact, as opposed to merely statistically disproportionate impact, violated the equal protection clause.

The Court's reliance on the burdening impact in *Hunter* as a basis for invalidating the law at issue in that case does not violate either of the principles underlying the rejection of disproportionate-impact analysis. Judicial deference to legislative acts is appropriate when those acts are rational and not arbitrary. On the other hand, bur-

186. 393 U.S. at 387.

187. *But cf.* 393 U.S. at 395 (Harlan, J., concurring) (asserting that the provision at issue had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest").

188. 402 U.S. at 141. Three of the dissenting Justices would have held the provision unconstitutional as an express discrimination against the poor. 402 U.S. at 145 (Marshall, Brennan & Blackmun, JJ., dissenting).

189. 393 U.S. at 391.

190. 393 U.S. at 391. The idea that the majority needs no protection against discrimination may not be as self-evident today as it was several years ago. *See* Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733 (1978). Nonetheless, the Court's reasoning in *Hunter* was sound. Though the challenged provision applied to whites as well as blacks, in reality it would have disadvantaged only blacks.

dens that fall solely on a minority are presumptively irrational and warrant a more probing judicial review. Moreover, the equal protection clause protects the individual, not the group, when invoked in the face of a law burdening only the minority. The individual's injury—that he is disadvantaged solely because of his minority status—is, of course, felt by others of the minority group as well. Unlike the plaintiff challenging a merely statistically disproportionate impact, however, the plaintiff challenging an impact that falls solely upon his group need not rely on the injury to others to state his claim. His individual injury offends the equal protection clause.

With these precedents in mind, the reason why the plaintiffs did not prevail in *Washington* becomes clear. Their allegation that the screening test was unconstitutional because it "excluded a disproportionately high number of Negro applicants"[191] presented no more than a statistically disproportionate-impact analysis.[192] As in *Jefferson* and *James*, that approach was unsuccessful.[193] According to *Washington*, then, the equal protection clause is not violated simply because "a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups."[194]

It is important to note that the disproportionate-impact approach had earlier proved equally unsuccessful in the multimember district cases. The Supreme Court stated in *White* that, for plaintiffs to sustain a vote dilution claim, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."[195] Thus, something more than the

191. 426 U.S. at 233.

192. The Court has not completely rejected the use of statistics in proving a denial of equal protection. Indeed, since *Washington* the Court has given great weight to statistical evidence of a disproportion between minority population and minority jury participation. *See* Castaneda v. Partida, 430 U.S. 482, 494 (1977). Nonetheless, the Court in *Castaneda* was merely following the rule it established in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 & n.13 (1977), and Washington v. Davis, 426 U.S. 229, 242 (1976), that a sufficiently dramatic disproportionate impact may evidence purposeful discrimination.

193. That approach was, however, understandable. Prior to *Washington*, the Supreme Court's decisions left the role of purpose and effect unclear, and many lower courts had adopted a disproportionate-impact analysis as the standard by which to assess claims of racial discrimination allegedly violating the equal protection clause. *See* Washington v. Davis, 426 U.S. 229, 242-45 & n.12 (1976).

194. 426 U.S. at 245.

195. 412 U.S. at 765-66. In fact, the Supreme Court's reversal in Whitcomb v. Chavis, 403 U.S. 124 (1971), *revg.* 305 F. Supp. 1364 (S.D. Ind. 1969), was no more than a rejection of disproportionate-impact analysis. The trial court had "identified an area of the city as a ghetto, found it predominantly inhabited by poor Negroes with distinctive substantive-law interests and thought this group unconstitutionally underrepresented because the proportion of legislators with residences in the ghetto . . . was less than the ghetto's proportion of the population." 403 U.S. at 148. Absent evidence that the ghetto residents had less opportunity than did other residents of the district to participate in the political process, the Supreme Court held that the bare disproportion was insufficient to prove an invidious discrimination. 403 U.S. at 149.

naked statistical argument rejected in *Jefferson* and *James* is required to invalidate a multimember district. According to *White*, the plaintiffs must show that "the political processes leading to nomination and election were not equally open to participation by the group in question."[196]

Thus, it is clear that the *White* test, though characterized as effect- or impact-oriented, involves more than simply disproportionate-impact analysis. Many interest groups, racial and nonracial, may be disadvantaged by the multimember district, for they might well be less likely to elect one of their own number in a multimember than in a single-member district. The mere failure to elect a favored candidate does not, however, violate the Constitution;[197] all that is required is that each group have a voice in the political process. Yet, where a racial group has had its political participation inhibited by official and private discrimination, has been the target of bloc voting, and has been denied the legislature's responsiveness in the past and may be similarly denied in the future, that group has been denied access to the political process in violation of the *White* test. In this context, the multimember district more than decreases the likelihood that a minority-favored candidate will be elected; indeed, it guarantees that neither candidates nor legislators need listen to that group's voice. Thus, although many groups may be disadvantaged by a multimember district, only such a racial group's voting strength is minimized or cancelled out by that electoral scheme. In the final analysis, the impact revealed through proof of the *White* test for multimember districts more closely resembles that in *Hunter* than in *Jefferson* or *James*: it "places special burdens on racial minorities within the governmental process."[198]

Preservation of *White*'s effect-oriented test, therefore, would not be inconsistent with the concerns the Supreme Court articulated in *Washington*. The *White* test does not open the floodgates to a tide of disproportionate-impact claims. Nor does it violate the principles on which *Washington* rejected disproportionate-impact analysis.

Similarly, in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd. per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), the Fifth Circuit recognized that the evaluation of multimember districts involves more than a numerical inquiry: "[A]ccess to the political process and not population [is] the barometer of dilution of minority voting strength." 485 F.2d at 1303. In addition, see Beer v. United States, 425 U.S. 130, 157 (1976) (Marshall, J., dissenting).

196. 412 U.S. at 766.

197. *See* Whitcomb v. Chavis, 403 U.S. 124, 153 (1971): "As our system has it, one candidate wins, the others lose. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates. . . ."

198. Hunter v. Erickson, 393 U.S. 385, 391 (1969).

Surely even under *Washington* the court may justly withhold its judicial deference to legislative acts where their vote-dilutive impact falls, as it can in multimember districts, solely on the minority. Finally, under *White* the right to vote remains an individual right,[199] and the plaintiff claiming vote dilution clearly asserts such a right.

IV. CONCLUSION

White's effect-oriented test for multimember districts is unaffected by *Washington*'s insistence upon discriminatory intent in racial discrimination claims. Whether viewed as a measure of a fundamental interest or of racial discrimination, the *White* test falls outside the scope of *Washington*'s intent requirement. Thus, in vote dilution cases the inquiry remains whether the multimember district minimizes or cancels out minority voting strength. That inquiry is simply a part of the constitutionally mandated goal of all election districting: to ensure each voter "an equally effective voice" in the political process.[200]

199. *See* 412 U.S. at 781 (Brennan, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 561 & n.39 (1964).

200. Reynolds v. Sims, 377 U.S. at 565.